EX PARTE OR LATE FILED

PATTON BOGGS, L.L.P.
2550 M STREET, N.W.
WASHINGTON, D.C. 20037-1350
(202) 457-6000

FACSIMILE: (202) 457-6315

WRITER'S DIRECT DIAL
(202) 457-6340

August 12, 1996

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW
Room 222
Washington, D.C. 20554

RECEIVED
AUG 12 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

**Re: *Ex Parte Presentation***
**ET Docket 95-183 and PP Docket No. 95-183** 93-253

Dear Mr. Caton:

Pursuant to Section 1.1206(2) of the Commission's Rules, I have attached a summary of an *ex parte* presentation made on behalf of Commco, L.L.C. ("Commco") in connection with ET Docket No. 95-183 and PP Docket No. 95-183, which was delivered to Chairman Hundt today, August 12, 1996.

If you have any questions about this matter, please call me at at (202) 457-6340.

Very truly yours,

Stephen Diaz Gavin

Enclosure
cc: The Honorable Reed Hundt
b:\exparte2.ltr

No. of Copies rec'd 0+1
List ABCDE

# PATTON BOGGS, L.L.P.

## MEMORANDUM

**TO:** The Honorable Reed Hundt

**FROM:** Stephen Diaz Gavin and John Fithian

**DATE:** August 9, 1996

**SUBJECT:** Processing Freeze on 39 GHz License Applications

---

Our client, Commco, L.L.C. of Sioux Falls, South Dakota, intends to use 39 GHz authorizations for a new "last mile" wireless service. Last December, the Commission froze the processing of applications of Commco and several other companies in the 39 GHz Band of frequencies, ostensibly for the purpose of retroactively applying auction procedures to the areas where their applications were pending. Most of the applications had already been amended to remove frequency conflicts. For legal and equitable reasons alone, because of the freeze's retroactive scope, we would urge the FCC to resume the processing and granting of all such applications amended on or before December 15, 1995. Here, however, we wish to underscore an inequity whose harm extends beyond the 39 GHz companies to the consumer: the potential damage done to competition if this freeze is left in place.

In mid-1994, Commco and several pioneering entrepreneurial companies (the "39 GHz companies") owned by principals with long and proven track records in all aspects of the telecommunications industry began filing applications for point-to-point microwave licenses in the 39 GHz band. They saw the opportunity, through development of a new technology, to provide new kinds of communications services over a small portion of these little-used frequencies. Among those services is an array of new wireless "last mile" technology for businesses and individual consumers in the local loop. The 39 GHz companies would provide voice and data services, as well as "state of the art" features to frequencies which are still virtually unused (an advantage for high speed data transmissions).

All this would be exciting were it only to be applied to the lucrative urban/commercial portion of the local loop, which seems the exclusive focus of many larger telecommunications companies, and which indeed remains dominated, in most markets, by a single service provider. The 39 GHz companies wish not only to serve larger markets, but also seek to reach beyond them to areas with fewer choices. If you review their application areas, you will see that several of the 39 GHz companies have specifically targeted smaller cities and rural areas. They wish to provide a competitive,

wireless alternative, offering a full array of services for small businesses, residential consumers and, eventually, the rural market, all of which seem otherwise destined to be underserved for a long time in a wire-lined world.

Although the new services would initially be concentrated in more densely populated areas, much like cellular telephone service, the 39 GHz providers are relying on serving suburban, small town and rural areas within 2 to 5 years. Moreover, also like cellular, increased demand for equipment to provide service and improvements in transmission, reception and customer set equipment will all stimulate sufficient customer demand to allow penetration into more, and more distant, outlying areas. In the past 18 months, the cost for one unit to connect to the network has been reduced by 50% and should continue to decline at a rapid rate over each of the next 12 to 18 months. Parity in small telecommunications markets is, therefore, a central element in the business plans of many 39 GHz companies.

The wireless technology offered by the 39 GHz companies can help the local loop evolve beyond a mere resale environment. Moreover, if America is to remain competitive in business and education into the next century the most complex telecommunications services must be available everywhere, not only in the most lucrative urban markets. Technological innovators like the 39 GHz companies will, if given the opportunity, be key players in realizing the goals of facilities-based competition and universal service.

On behalf of Commco, we urge the FCC to lift the freeze on the 39 GHz Band that presently blocks the roll out of this very promising technology and process those applications for those frequencies amended on or before December 15, 1995 for grant, so that many more local markets may experience the lower prices and more and better services that competition will inevitably bring. Further, to the extent that the freeze is tied to the FCC's ultimate action on the rulemaking regarding the 39 GHz band, it should be uncoupled as soon as possible to allow the 39 GHz companies to proceed to build their systems.

# United States Senate

WASHINGTON, D.C. 20510

February 9, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Dear Chairman Hundt:

We continue to support your efforts and those of the entire Federal Communications Commission ("Commission" or "FCC") to carry out the intent of Congress that the Commission grant mutually exclusive applications for authorizations in certain radio services on the basis of competitive bidding, as authorized by the Omnibus Budget Reconciliation Act of 1993 ("1993 Budget Act" or "'93 Act").

In granting authority to the FCC to award such authorizations by auction, Congress expressly limited that authority to situations involving mutually exclusive applications. Moreover, Section 117 of the 1993 Budget Act, now codified at 47 U.S.C., section 309(j)(6)(E), directed the Commission to make every effort to avoid mutually exclusive application situations by use, among other things, of engineering solutions such as frequency coordination and amendments to eliminate mutually exclusive situations. The opportunity to generate revenues was not to be used as justification for ignoring this direction.

While some segments of the industry have expressed concern about Commission action regarding allocation of specific portions of the electromagnetic spectrum, our concern is with the larger issue of Commission implementation of Congressionally-imposed responsibilities under the '93 Act. We are particularly interested in the Commission's treatment of it's auction authority under the *Notice of Proposed Rulemaking and Order*, FCC 95-500, (the "Order") covering the proposed revision of rules governing processing of 39 GHz applications.

We wholly support spectrum auctions, where reasonable, appropriate and truly representative of Congressional intent. By virtue of either completing the application process or amending already submitted applications to eliminate mutual exclusivity concerns, applicants have in essence established a fairly reasonable expectation that they would not be subjected to the competitive bidding process. In considering the public interest

to generate revenues under the '93 Act. Congress determined that the promotion of more competitive services for the public and more efficient use of spectrum were of paramount importance when compared to allocation by competitive bidding.

It therefore seems anomalous to the clearly expressed intent of Congress within the Act that applicants who have completed the application process would subsequently be exposed to having to compete for that spectrum in auctions. Clarification of the Commission's reasoning and interpretation of it's auction authority under the 1993 Budget Act would be appreciated.

Thank you for your prompt attention in this matter. We look forward to your reply.

Larry Pressler

Larry Pressler

Tom Daschle

Thomas Daschle

# United States Senate

WASHINGTON, DC 20510

August 6, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 "M" Street, N.W.
Washington, D.C. 20554

Dear Chairman Hundt:

We write to urge the FCC to resume the processing and granting of all non-competitive applications in the 39 GHz Band of frequencies that were amended on or before December 15, 1995, all of which have been subject to a processing freeze initiated by the Commission last December.

On December 15, 1995, the FCC released a Notice of Proposed Rulemaking and Order, FCC 95-500 (the "Order"), which seeks to apply competitive bidding procedures to the 39 GHz Band of frequencies, even with respect to already pending non-competitive applications, many of which had been amended at the FCC's request to remove frequency conflicts. Many perfected applications are affected by this rule change, which the FCC has imposed retroactively. This delay is preventing the roll out by some small entrepreneurs of pioneering new wireless "last mile" technology for the local loop that would bring competition to local markets now primarily dominated by one service provider. We hope that the FCC will lift the freeze on the 39 GHz Band and process pending authorizations for grant, so that many local markets may experience the benefits of competition (lower prices and more and better services) that this new technology will bring.

We feel that the retroactive nature of the freeze is inequitable. The Order may also run afoul of the intent of Congress to limit the FCC's authority to submit pending applications to auction under the Omnibus Budget Reconciliation Act of 1993, and may violate a congressional directive to the FCC, now codified at 47 U.S.C. 309(j)(6)(E), to avoid mutually exclusive situations by utilizing frequency coordination and application amendments. The processing freeze ignores this directive by preventing the processing of amendments that would eliminate the mutually exclusive status of many applications.

Perhaps just as distressing as the legal problems posed by the freeze, however, is its practical effect, which blocks the deployment of very promising technology that would benefit underserved populations. In addition to serving the major cities that are the exclusive focus of some larger telecommunications competitors, several of the 39 GHz companies have specifically targeted smaller cities and rural areas, which have even fewer competitive alternatives. The 39 GHz companies will make available both voice and data services and bring "state of the art" features to these markets on frequencies which remain

largely unused (this fact is actually an advantage for high speed data transmissions), providing a competitive, wireless alternative for small businesses and residential consumers.

The FCC's action in freezing the pending 39 GHz applications frustrates the principal policy enunciated in the Telecommunications Act of 1996: "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." The freeze delays the deployment of a promising source of such benefits for the Nation. We therefore urge you to resume the processing and granting of all 39 GHz applications that were amended to remove conflicts with other applications on or before December 15, 1995.

Moreover, and finally, we strongly urge the FCC, once it has corrected this situation by lifting the freeze, to make sure that any build-out requirements in its eventual rulemaking on the subject are reasonable. Requiring an excessively large or speedy build-out by the 39 GHz companies would not only doom their efforts from the start, but would also frustrate, as does the freeze itself, the intent of Congress clearly expressed in the Telecommunications Act and related laws.

Very truly yours,

Bill Frist

Kay Bailey Hutchison

Tom Kyl

cc: All FCC Commissioners.

# Congress of the United States
Washington, DC 20515

August 2, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Chairman Hundt:

We write to urge the FCC to resume the processing and granting of non-competitive applications in the 39 GHz band of frequencies that were amended on or before December 15, 1995. The retroactive nature of the current freeze is inequitable.

The FCC's December 15, 1995 notice of proposed rulemaking appeared to apply competitive bidding procedures to the 39 GHz band of frequencies, including already pending non-competitive applications which had been amended at the FCC's request to remove frequency conflicts. We have concerns that such a rule change may violate both the intent of Congress to limit the FCC's authority to submit pending applications to auction under the OBRA 93 and a congressional directive to the FCC to avoid mutually exclusive situations by utilizing frequency coordination and application amendments. The processing freeze seems to ignore this directive by preventing the processing of amendments that would eliminate the mutually exclusive status of many applications.

This delay is preventing the implementation of new wireless "last mile" technology for the local loop that will bring competition to local markets now dominated by one service provider. In addition, the practical effect of the freeze is the blocking of deployment of promising technology that could benefit underserved populations. Several of the 39 GHz companies have specifically targeted for service smaller cities and rural areas, which have even fewer competitive alternatives.

The principal policy of the Telecommunications Act of 1996 was "to promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies." We urge you to resume the processing and granting of 39 GHz applications that were amended to remove conflicts with other applications on or before December 15, 1995. Finally, we urge the FCC to

make sure that any build-out requirements in its eventual rulemaking on the subject are reasonable.

Thank you for your consideration of this matter.

Sincerely,

John Breaux

Rendell Ford

Byron L. Dorgan

UNITED STATES SENATE
WASHINGTON, D. C. 20510

TRENT LOTT
MISSISSIPPI

July 9, 1996

Dear Chairman Hundt:

I would like to encourage you to resume the processing and granting of all noncompetitive applications in the 39GHz Band of frequencies that were amended on or before December 15, 1995.

The action to freeze these pending 39GHz applications will neither promote competition nor provide higher quality telecommunication services for American consumers. In fact, the retroactive nature of this proposed rulemaking may be both unfair, and not in compliance with Congressional intent.

Your favorable consideration of this request will ensure that many of America's smaller cities and rural areas will have access to competitive "state-of-the-art" wireless alternatives for voice and data services. With best wishes, I am

Sincerely yours,

Trent Lott

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
Washington, D.C. 20554

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

April 2, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, Room 814
Washington, D.C. 20554

Dear Chairman Hundt:

As you know, the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act") authorized the Federal Communications Commission ("FCC" or "Commission") to award licenses from among mutually exclusive applications by means of competitive bidding. We support the FCC in its endeavor to implement the Congressional directives regarding the spectrum auction process and applaud the successes that the Commission has achieved in this regard since 1993.

We are concerned, however, about Commission actions in two recent rulemakings which freeze the processing of applications pending an open-ended transition to competitive bidding. The first was issued by the Commission on December 15, 1995 in its Notice of Proposed Rulemaking and Order, FCC 95-500 (the 39 GHz Band Order). In this Order, the Commission froze the processing of amendments that were intended to remove frequency conflicts. The second was issued by the Commission on February 8, 1996 in its Notice of Proposed Rulemaking, FCC 96-18 (the Paging NPRM). In this Order, the Commission froze the processing of new applications for all paging channels other than nationwide channels.

It appears to us that the Commission has taken a "one size fits all" approach by freezing the status quo in order to make a transition to competitive bidding. Congress expressly limited the Commission's auction authority to situations involving mutually exclusive applications and, moreover, directed the Commission to avoid mutually exclusive applications situations. By freezing the processing of frequency coordination and application amendments in the 39 GHz Order, the Commission is creating the situation of mutually exclusive competing applications by not allowing the processing of amendments which would otherwise eliminate the mutually exclusive status of many pending applications. The freeze would prevent the build-out of the 39 GHz communications systems that will bring competition to a market currently dominated by one service provider.

Similarly, the paging freeze will prevent incumbent licensees from growing their businesses, while their direct competitors, the nationwide paging companies, are free to expand. Such a policy will cause significant harm to the small businesses who are operating in this intensely competitive market.

While we understand the Commission has taken interim procedures to permit licensees the ability to expand their systems within their own interference contours, this accommodation will not bring service to the customer whose pager does not work in a certain area. Similarly, the Commission's decision to permit expansion beyond the current interference contour on a secondary licensing basis is illusory, since the underlying license is conditional on the licensee's ultimate ability to bid successfully at auctions. Rather than ameliorate the effect of the freeze, these interim proposals provide further advantages to the nationwide carrier.

We are particularly concerned that one effect of this freeze may well be to cost hundreds of Americans their jobs, either permanently or temporarily. We have been informed that one company, a manufacturer that provides infrastructure for paging companies, has seen orders for its systems drop -- contemporaneously with the Commission's announcement of the freeze -- to zero. Unless the Commission acts swiftly, this company will be forced to lay off three to four hundred employees. Certainly the Commission should not be in the position of costing hundreds of gainfully employed people their jobs.

The intent of Congress is clear. The Commission's spectrum decisions are not simply to generate revenues but to provide the best and most efficient use of the spectrum and to promote competition in the marketplace.

We would appreciate if you would advise us as to the Commission's rationale for imposing the freezes in the two proceedings and, provide us with a date by which the Commission expects to begin processing applications.

In addition, we strongly encourage the Commission to review and revisit the two Orders in question with these thoughts in mind.

We appreciate your attention to these important matters and look forward to your response.

Sincerely yours,

The Honorable Thomas J. Bliley, Jr.
Chairman

The Honorable John D. Dingell
Ranking Member

TIM JOHNSON
SOUTH DAKOTA

COMMITTEES:
AGRICULTURE
RESOURCES

WASHINGTON OFFICE:
2400 RAYBURN BUILDING
WASHINGTON, DC 20515-4101
202-225-5801

# Congress of the United States
## House of Representatives
### Washington, DC 20515-4101

RAPID CITY OFFICE:
606 SOUTH STREET
SUITE 106
RAPID CITY, SD 57701
(605) 341-4868

ABERDEEN OFFICE:
20 SOUTH AVENUE SW
SUITE C
ABERDEEN, SD 57401
(605) 225-8448

SIOUX FALLS OFFICE:
516 SOUTH DAKOTA AVENUE
SIOUX FALLS, SD 57102
(605) 336-4854

TOLL FREE
1-800-487-4828

July 23, 1996

The Honorable Reed E. Hundt
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Dear Chairman Hundt:

I write to express my support for you and the Federal Communications Commission (FCC) to continue processing and granting all non-competitive applications for operating authorizations in the 39 gigahertz (GHz) Band of frequencies that were amended on or before December 15, 1995, all of which have been subject to a processing freeze initiated by the FCC on that date, which subjects this section of spectrum retroactively to auction procedures.

One company greatly affected by the freeze is Commco, L.L.C., of Sioux Falls, in my home state of South Dakota. I urge this action not only on their behalf, however, but also for the several other entrepreneurial 39 GHz applicants, all of whom seek to offer promising technologies over this previously undervalued and ignored spectrum area. For reasons of equity and fairness, I ask you and the Commission to immediately take all actions necessary to end this processing freeze.

The freeze began on December 15, 1995, when the FCC released a Notice of Proposed Rulemaking and Order, FCC 95-500 (the "Order"), which would apply competitive bidding procedures to applicants for authorization in the 39 GHz Band. The Order is without precedent, in that it would apply those procedures *retroactively* to already pending non-competitive applications, many of which had been amended at the Commission's direction to remove frequency conflicts. The applications had thus been submitted, amended, and perfected according to the Commission's established application procedures.

I find the retroactive element of this freeze to be clearly inequitable to those companies which spent time, effort and dollars, and which organized business plans in reliance upon the pre-freeze procedures. The freeze also seems to fly in the face of the express intent of Congress to limit the scope of the Commission's auction authority to the submittal of only mutually exclusive applications to auction procedures under the Omnibus Budget Reconciliation Act of 1993, and may also violate Congress' directive in Section 117 of that Act, which has since been codified at 47 U.S.C. 309(j)(6)(E), to avoid mutually exclusive situations by utilizing frequency coordination and application amendments. The freeze ignores this congressional directive by preventing the processing of amendments that would eliminate the mutually exclusive status of many applications. Congress certainly did not intend for the generation of revenues to be used as a justification for circumventing its directive in this manner.

The legal and equitable problems posed by retroactivity, however, are no more egregious than the impediment the processing freeze poses to some small entrepreneurs, like Commco, in their efforts to roll out pioneering new wireless technology for the "last mile" of the local loop. This technology would bring competition to local markets now served primarily by a single telecommunications provider. If the FCC would act quickly to lift the freeze on the 39 GHz Band and process pending authorizations for grant, many local markets will experience lower prices and better services more quickly, which are the ultimate benefits of competition.

Moreover, and of particular concern to South Dakota and other states with substantial small town and rural populations, the 39 GHz applicants seek to go beyond merely serving major cities and their lucrative business markets, which seem to be the sole targets of many larger communications providers. Several 39 GHz companies have specifically targeted smaller cities and rural markets, which have even fewer competitive alternatives. If the Commission lifts the freeze, these companies will seek to provide voice and data services, as well as other "state of the art" features, to small businesses and residential consumers in these areas, using new technologies over underutilized spectrum.

If left in place, the FCC's processing freeze of pending 39 GHz applications will only serve to frustrate the promotion of competition and all of its benefits for consumers and the rapid deployment of new communications technologies The freeze is delaying the deployment of a very promising source of such benefits for rural states like South Dakota, and for the Nation. I therefore urge the Commission to lift the freeze immediately. Furthermore, I urge the Commission to ensure that the build-out requirement in any eventual rule making on the subject is reasonable. Any requirement for a build-out so large or quick that it would undermine the efforts of the 39 GHz companies would, in the same manner as the freeze itself, also frustrate the promotion of competition.

I once again wish to voice my support for the FCC's commendable efforts at implementation, and urge the Commission to resume the processing and granting of all 39 GHz applications that were amended to remove the conflicts with the other applications on or before December 15, 1995.

Tim Johnson
Member of Congress

cc: All FCC Commissioners.